IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. FRANCISCO CUEVAS GALLEGO, Appellant.	)	2 CA-CR 2006-0133 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20053483

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

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B R A M M E R, Judge.

¶1 A jury found appellant Francisco Gallego guilty of theft of a means of transportation by control and/or by controlling stolen property and third-degree burglary. After finding Gallego previously had been convicted of two felonies, the trial court sentenced him to mitigated, concurrent prison terms of ten and eight years. On appeal, based on *Batson v. Kentucky,* 476 U.S. 79, 106 S. Ct. 1712 (1986), Gallego argues the trial court erred by rejecting his challenge to the state's use of two peremptory challenges. Gallego also contends the jury was improperly instructed on the definition of "stolen property" and that his rights to due process and a jury trial were violated when his prior convictions were found after a bench trial. We affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the verdicts and resolve all reasonable inferences against Gallego. *See State v. Riley*, 196 Ariz. 40, ¶ 2, 992 P.2d 1135, 1137 (App. 1999). On August 15, 2005, Jesus Rodriguez was awake very early in the morning when he heard a car start. He looked out a window and saw two men inside a white car that had been in his sister's care. Rodriguez awakened his sister and, driving another vehicle, began to follow the men as they drove away in the white car. They caught up to them at an intersection, and Rodriguez yelled at the driver to stop. However, the white car "took off" and turned towards a convenience store.

¶3 Tucson police officer Martin Escobar was parked in front of the convenience store. He heard screeching tires behind the store and began to look around. Also, Escobar

encountered Rodriguez and his sister, who were yelling, "They stole our car." Escobar headed in the direction from which the tire screech came. He saw a white car "speeding away" that failed to stop at a stop sign, followed it at a distance, but eventually lost sight of it. Escobar briefly drove around the neighborhood looking for the vehicle and saw two Hispanic males, "walking kind of hurriedly, looking back behind their shoulders." When Escobar approached the men, he noticed they were nervous and surprised to see him. One of the men dropped a black object, later identified as a glove. Escobar ordered the men to the ground and called for backup, which arrived almost immediately. Rodriguez also arrived at the scene, saw the suspects in a patrol car, and recognized them as the men who had stolen the car. Police found the white car nearby with the ignition and steering column damaged.

¶4 Gallego and Joshua Melecio were indicted on charges of theft of means of transportation and third-degree burglary.[1] A jury found Gallego guilty of both charges. This appeal followed.

Discussion

¶5 Gallego argues the state's use of peremptory challenges to remove two potential jurors, one of whom was black, the other Hispanic, violated his constitutional rights pursuant to the Equal Protection Clause of the Fourteenth Amendment as interpreted in

[1]Melecio was also charged with possession of burglary tools. He later pled guilty to theft of means of transportation.

Batson.[2] In reviewing a *Batson* challenge, we accept the trial court's findings of fact unless they are clearly erroneous, but we review de novo the court's application of the law. *See State v. Lucas*, 199 Ariz. 366, ¶ 6, 18 P.3d 160, 162 (App. 2001); *State v. Harris*, 184 Ariz. 617, 618, 911 P.2d 623, 624 (App. 1995).

¶6 After the state had made its peremptory challenges, Gallego stated he wanted to make a *Batson* challenge, because "the State struck two [potential jurors], [W.], who was black, and [F.] who was Hispanic." The prosecutor stated W. "talked about how he had been convicted of a prior assault or some sort [of] a violent act, and that was the grounds for the strike." As for F., the prosecutor stated he

> had indicated [during voir dire] when I asked the question have you ever seen somebody out and about, and, you know, thought to yourself, gee, I have seen them before, he indicated that he had never had that happen to him. And that was one part of the grounds of why I struck him.

The court then added it "was a little bit concerned" with F. "because he wasn't really all that sure that he would listen to the official court interpreter." The court then stated it found both of the explanations "race neutral and that there [was] no violation of *Batson*."

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[2]Gallego also claims the state's actions violated the Arizona Constitution, a claim that was not made to the trial court. "[W]ith respect to *Batson* challenges, even if we were to conclude that the defendant did not waive what he believes to be a state constitutional violation, the protections under our state constitution are no greater than those provided for under the federal constitution." *State v. Lucas*, 199 Ariz. 366, ¶ 5, 18 P.3d 160, 161 (App. 2001).

¶7 A party may not exercise a peremptory jury challenge solely on the basis of gender, race, or ethnicity. *See Batson*, 476 U.S. at 89, 106 S. Ct. at 1719; *State v. Purcell*, 199 Ariz. 319, ¶ 22, 18 P.3d 113, 119 (App. 2001). A trial court's analysis of a *Batson* challenge involves three steps. First, the challenging party must present a prima facie showing of prohibited discrimination. *Purkett v. Elem*, 514 U.S. 765, 767, 115 S. Ct. 1769, 1770-71 (1995); *see also State v. Martinez*, 196 Ariz. 451, ¶ 16, 999 P.2d 795, 800 (2000). Second, the striking party must then provide a neutral explanation for exercising the right to remove a panel member; the explanation need not be persuasive or even plausible, only "legitimate." *Purkett*, 514 U.S. at 768, 115 S. Ct. at 1771. And unless a discriminatory intent is inherent in the explanation, the reason offered will be deemed neutral. *Id.* Third, if a neutral explanation is provided, the trial court must determine whether the challenger has sustained the burden of proving purposeful discrimination, taking into account the credibility and persuasiveness of the proponent's explanation. *Id.; Martinez*, 196 Ariz. 451, ¶ 16, 999 P.2d at 800. "This third step is fact intensive and will turn on issues of credibility, which the trial court is in a better position to assess than is this Court. Therefore, the trial court's finding at this step is due much deference." *State v. Newell*, 212 Ariz. 389, ¶ 54, 132 P.3d 833, 845 (2006) (citation omitted).

¶8 The state contends Gallego failed to establish a prima facie case for purposeful discrimination, the first step of the *Batson* analysis. However, "[o]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled

on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." *Hernandez v. New York*, 500 U.S. 352, 359, 111 S. Ct. 1859, 1866 (1991); *see State v. Gay*, 214 Ariz. 214, n.4, 150 P.3d 787, 793 n.4 (App. 2007) (same); *State v Rodarte*, 173 Ariz. 331, 333, 842 P.2d 1344, 1346 (App. 1992) (when prosecutor offers explanation for peremptory challenge, it "waive[s] appellant's initial burden.") And, by giving two facially neutral explanations, the prosecutor satisfied the second step of the *Batson* test. Accordingly, we turn our attention to the third step.

Peremptory Challenge of W.

¶9 During voir dire, after the trial court asked if anyone had "been arrested, charged, or convicted of anything," W. admitted he had been "arrested about thirteen years ago for a little simple assault" but stated it would not interfere with his fairness or impartiality. There was no further questioning of W. as to the nature of the assault or what had happened after he was arrested. Therefore, the prosecutor's statement that W. had been convicted and that the crime may have been violent was not necessarily accurate.

¶10 Gallego cites *Caldwell v. Maloney*, 159 F.3d 639, 651 (1st Cir. 1998), for the proposition that "[s]erious questions of pretext arise when the facts in the record are 'simply objectively contrary to' the prosecutor's proffered justifications." Although we agree with this general legal proposition, we do not think this is such a case. For example, Gallego relies on *McClain v. Prunty*, 217 F.3d 1209, 1221 (9th Cir. 2000), where the prosecutor

stated a potential juror mistrusted the system even though she had not said that. The prosecutor also had speculated that the potential juror had lied about being a stewardess, even though she had not claimed to be one. *Id.* And, in a second case upon which Gallego relies, *People v. Silva*, 21 P.3d 769, 790, 791, 796 (Cal. 2001), there was simply no evidence that a potential juror had an aggressive personality or would be reluctant to return a death verdict, the reasons asserted by the prosecutor to support the peremptory challenge.

¶11 Similarly, in *Johnson v. Vasquez*, 3 F.3d 1327, 1330 (9th Cir. 1993), the court reversed the defendant's conviction because the prosecutor had stated the potential juror was struck because she worked for a defense attorney when she had in fact worked for a family law practitioner, and the prosecutor's "jury panel scratch sheet" indicated her correct employment. Nor did the record support the prosecutor's asserted reasons that the potential juror was uneducated and answered questions evasively. *Id.*

¶12 Here, in contrast, W. admitted to having been arrested for assault. Although the prosecutor may have misspoke when she stated W. had been convicted when the record does not support that fact, we cannot say that this possible misstatement is similar in gravity or scope to the serious errors found in the cases upon which Gallego relies. The state notes that a potential juror's criminal history has been found to be a racially neutral explanation. *See State v. Bailey*, 160 Ariz. 277, 281, 772 P.2d 1130, 1134 (1989). And, in the present case, no potential juror other than W. admitted to having been arrested or charged with an

arguably violent act,[3] so the reason for striking him was not equally applicable to another juror who had not been challenged. We conclude that the trial court did not err in denying Gallego's *Batson* challenge as to W.

Peremptory challenge of F.

¶13 During voir dire, the prosecutor asked whether anyone on the panel had "r[u]n into somebody and you looked at them, and you knew that you knew them. And you actually remembered where you knew them from, even though you had only met them once before?" When asked for clarification, the prosecutor again asked whether anyone on the panel had

> just run into somebody on the street or at a restaurant, maybe when you go to dinner, you meet somebody and you're waiting to be seated and you recognize that you know—maybe you interviewed that person for a job a couple of years before. And then, although you had only met that person once before, you recognized them?

The prosecutor then asked for a show of hands and, apparently after seeing the result, stated "Let's actually just do it the other way. Who hasn't had that happen?" One prospective juror asked for clarification, and one commented that he/she "may have had it happen, but I just don't remember off the top of my head," but the record does not identify who they were. Moreover, the record does not indicate which potential jurors raised their hands in response to the prosecutor's questions. Very soon after, Gallego's defense attorney had the

[3]Other potential jurors admitted to driving under the influence violations, one admitted to a firearm violation, and one admitted to a civil disobedience arrest or conviction. The latter two potential jurors were both later excused for cause.

opportunity to ask the panel questions and asked a "follow up" question similar to those posed by the prosecutor about "thinking [one] kn[o]w[s] somebody, and then finding out that [one] d[oes]n't." As stated above, the prosecutor stated F.'s response to the question she posed, that he had never had the situation happen to him before, was the reason for the peremptory challenge.

¶14 Gallego asserts there were multiple problems with the state's peremptory challenge of F. He claims the prosecutor's question was unclear, the record is silent on how F. answered the question, and that F. may have been struck for a reason that applied to non-Hispanic jurors who were not struck. *See Miller-El v. Cockrell*, 537 U.S. 322, 343, 123 S. Ct. 1029, 1043 (2003) ("[T]hree of the State's proffered race-neutral rationales for striking African-American jurors pertained just as well to some white jurors who were not challenged and who did serve on the jury."); *McClain*, 217 F.3d at 1220 ("A prosecutor's motives may be revealed as pretextual where a given explanation is equally applicable to a juror of a different race who was not stricken by the exercise of a peremptory challenge.").

¶15 Gallego correctly notes the prosecutor's question could have been more clear, but it was asked more than once and there was at least some clarification given. We disagree with Gallego's contention that "it can be inferred from the prosecutor asking for votes both ways that the panel was split in its answers to the question. There is certainly no reason to believe that [F.] was the only panel member answering in the negative, or the record would surely reflect that singular response." It was at least equally as likely that because so many

potential jurors raised their hands when the prosecutor first asked the question, the prosecutor then rephrased her question in the negative. There is simply no evidence as to which of the potential jurors raised their hands and which did not. We note that it is a defendant's burden to prove purposeful discrimination. *Purkett*, 514 U.S. at 768, 115 S. Ct. at 1771. And, "[n]ormally, the party asserting a *Batson* claim has the burden of . . . preserving the record, and any ambiguities in the record will be construed against that party." *People v. Rivera*, 852 N.E.2d 771, 789 (Ill. 2006).[4] The trial court heard and observed the proceedings and could see how the potential jurors responded to the prosecutor's question. And, "the trial court is presumed to know and follow the law." *State v. Ramirez*, 178 Ariz. 116, 128, 871 P.2d 237, 249 (1994). We conclude the court did not err in finding the state's peremptory challenge of F. did not violate Gallego's constitutional rights.

Jury Instruction

¶16 Gallego also asserts the trial court improperly instructed the jury on the definition of "stolen property." We review de novo whether jury instructions properly state the law. *State v. Orendain*, 188 Ariz. 54, 56, 932 P.2d 1325, 1327 (1997). "Jury instructions must be viewed in their entirety when determining whether they adequately reflect the law."

[4]*But see United States v. Chinchilla,* 874 F.2d 695, 698 (9th Cir. 1989) (rejecting one of several purported bases for a peremptory challenge because "the prosecutor claimed that he struck the alternate juror Vasquez because of his age . . . , yet the jurors did not state their ages for the record, and this court has no other evidence of the prospective alternate's age").

State v. Gallegos, 178 Ariz. 1, 10, 870 P.2d 1097, 1106 (1994). We will reverse only if a reasonable jury would be misled by the instructions taken as a whole. *Id.*

¶17 Gallego was charged with theft of means of transportation under two theories, A.R.S. § 13-1814(A)(1) and/or (A)(5). The jury was instructed that

> A person commits theft of a means of transportation if, without lawful authority, the person
>
> 1) Controls another's means of transportation with the intent to permanently deprive the person of the means of transportation; or
>
> 2) Controls another person's means of transportation knowing or having reason to know that the property is stolen.

"Stolen" was then defined as "property that has been the subject of any unlawful taking."

¶18 Next, the jury was instructed that

> [t]he crime of theft of means of transportation includes the less serious crime of unlawful use of means of transportation. You may find the defendant guilty of one, but not both of the two crimes. . . .
>
> If you find the defendant not guilty of the more serious offense or if you cannot agree after reasonable efforts whether or not the defendant is guilty of the more serious offense, then you should consider the less serious offense.

Finally, the jury was instructed on A.R.S. § 13-1803, unlawful use of means of transportation,[5] and told that the offense requires proof of two things: "1) The defendant knowingly took unauthorized control over another's means of transportation; and 2) The defendant did so without intending to deprive the owner of it permanently."

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[5]Gallego requested the lesser-included offense instruction.

¶19 During the discussion on jury instructions, Gallego objected to the definition of "stolen" the trial court was prepared to give to explain § 13-1814(A)(5), stating that the proposed definition, "property that has been the subject of any unlawful taking," was incorrect.[6] Gallego stated that "stolen property is property that was taken with an intent to deprive the owner. . . . [There] has to be a distinction between theft and unlawful use and the distinction [is] the intent to deprive." The court overruled Gallego's objection.

¶20 We reject Gallego's contention that the jury was improperly instructed. The legislature chose to add the words "intent to permanently deprive" to only two of the five subsections of § 13-1814. If it had wanted to add this language to subsection (A)(5), it was certainly capable of doing so. Gallego essentially asks us to add a new element to the theft statute; we reject his invitation to do so. *See State v. Williams*, 175 Ariz. 98, 100, 854 P.2d 131, 133 (1993) ("Our task in interpreting the meaning of a statute is to fulfill the intent of the legislature that wrote it.").

¶21 Gallego correctly notes that the jury instructions on the two offenses, theft by control and unlawful use of means of transportation, result in these offenses having the same elements. However, the legislature is not prohibited from punishing the same conduct in two

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[6]The trial court apparently took its definition of the word "stolen" from A.R.S. § 13-2301(B)(2). "Stolen" is not defined in § 13-1814. Section 13-1814(B) states that the inferences set forth in A.R.S. § 13-2305 "apply to any prosecution under the provisions of [13-1814(A)(5)]." Section 13-2305 lists permissible inferences that can be used in an action for trafficking in stolen property, and § 13-2301 is the definition section for the chapter in which § 13-2305 appears.

different ways. *Cf.* A.R.S. § 13-116 ("An act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent."). The legislature clearly gave the prosecutor the discretion to charge the same act in different ways. *See State v. Lopez*, 174 Ariz. 131, 143, 847 P.2d 1078, 1090 (1992) ("Choosing which offense to charge and prosecute is within the discretion of the prosecutor. When conduct can be prosecuted under two or more statutes, the prosecutor has the discretion to determine which statute to apply.") (citation omitted); *State v. Hankins*, 141 Ariz. 217, 221, 686 P.2d 740, 744 (1984) (prosecutor was allowed to choose whether to prosecute conduct under aggravated assault or burglary statute, as "[i]t is clearly within the sound discretion of the prosecutor to determine whether to file charges and which charges to file"); *see also State v. Loughran*, 143 Ariz. 345, 349, 693 P.2d 1000, 1004 (App. 1985) (no violation of equal protection that defendant could be charged with violation of city code or state criminal code). And, the jury was correctly instructed to consider the offense charged under § 13-1814 before considering § 13-1803. *See Martinez*, 196 Ariz. 451, ¶ 37, 999 P.2d at 804 (jurors required "to use 'reasonable efforts' in reaching a verdict on the charged offense before considering lesser-included offenses.").

¶22 We reject Gallego's argument that we should read "intent to permanently deprive" into § 13-1814(A)(5) to "harmonize" it with § 13-1803. *See State v. Fell*, 203 Ariz. 186, ¶ 6, 52 P.3d 218, 220 (App. 2002). The statutes are not inconsistent, but rather punish the same conduct. And, as stated above, had the legislature intended to add this additional

element into § 13-1814(A)(5), it could have done so, as it did in two other subsections of that statute. Therefore, the trial court did not err in instructing the jury that "stolen" property is "property that has been the subject of any unlawful taking."

Prior Conviction

¶23 Gallego also contends that his Sixth Amendment right to a jury trial was violated when his prior convictions were found at a bench trial rather than by a jury. Gallego recognizes we have recently rejected this argument, *State v. Keith*, 211 Ariz. 436, ¶ 3, 122 P.3d 229, 230 (App. 2005), and merely presents this issue to preserve it in anticipation of the United States Supreme Court overruling *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219 (1998). Nonetheless, the trial court did not err in denying Gallego's request to have his prior convictions tried by a jury.

Disposition

¶24 We affirm Gallego's convictions and sentences.

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J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

_____
PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge